No. 90-1014

IN THE

Supreme Court of the United States

October Term 1990

ROBERT E. LEE, *et al.*,

Petitioners,

v.

DANIEL WEISMAN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") IN SUPPORT OF PETITIONERS

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EDITOR'S NOTE

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INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that has, over the past quarter century, represented the interests of America's Orthodox Jewish community before courts, legislatures, and other governmental bodies.[1] COLPA

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[1]COLPA has represented the full range of major national rabbinic, congregational, and educational organizations within the Orthodox community. These include:

a. Agudath Harabonim of the United States and Canada;

b. Agudath Israel of America;

has filed *amicus curiae* briefs in this Court in many of the leading religious freedom cases decided since COLPA's formation.

COLPA's interest in this case relates not to the narrow issue on which a conflict exists between the decision below and an earlier decision of the Sixth Circuit. *Amici* such as the National School Boards Association, the National Association of State Boards of Education, and the five States that joined to support granting of the writ of certiorari are concerned with whether a public high school graduation program may include an address or prayer in which the deity is invoked. That precise constitutional issue is, in and of itself, not of sufficient significance to the Orthodox Jewish community to warrant the filing of this *amicus* brief.

On the other hand, the multiplicity of lawsuits and related public controversies over this narrow question illustrate the damaging consequences of this Court's continued adherence to the Establishment Clause test of constitutionality first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). We are filing this *amicus* brief to provide the Court with additional information on the degree to which the *Lemon v. Kurtzman* "three-pronged" test has been invoked in litigation directed at religious observances of Orthodox Jews. We urge the Court to discard the *Lemon v. Kurtzman* test because, in our experience, its vague and overbroad terms provide an incentive for the initiation of meritless litigation and cast a heavy and unjustified burden on religious minorities and on lower courts.

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c. National Council of Young Israel;

d. The Rabbinical Alliance of America;

e. The Rabbinical Council of America;

f. Torah Umesorah, National Society of Hebrew Day Schools;

g. The Union of Orthodox Jewish Congregations of America.

ARGUMENT

THE "SECULAR PURPOSE" AND "PRIMARY EFFECT" STANDARDS ARE SO VAGUE AND MEANINGLESS THAT THEY JEOPARDIZE ALL GOVERNMENTAL ACCOMMODATION AND PROTECTION FOR RELIGIOUS OBSERVANCE

In 1962, shortly after its decision in *Braunfeld v. Brown*, 366 U.S. 599 (1961) — which had denied a constitutional exemption from Sunday-closing laws for Sabbatarians — this Court dismissed for lack of a substantial federal question a constitutional challenge under the Establishment Clause to a *legislative* authorization permitting Sabbatarians to stay open on Sundays. *Arlan's Department Store, Inc. v. Kentucky*, 371 U.S. 218 (1962). That decision was issued nearly one decade before the *Lemon v. Kurtzman* test was articulated. It is obvious, however, that a literal application of the "secular purpose" and "primary effect" components of the *Lemon* test could endanger such an exemption. Individuals who are insensitive to the conscientious convictions of Orthodox Jews could assert that the principal "purpose" of an exemption from Sunday closing laws is to aid Sabbath observance and that the "primary effect" of the exemption is to advance religion by enabling Orthodox Jewish merchants to observe the Sabbath by closing their shops on Saturdays because they may remain open on Sundays.

Experience under *Lemon v. Kurtzman* has proved that its three-part test is, in fact, attractive to potential litigants who lack tolerance for religious observance. In *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y.), *aff'd summarily*, 419 U.S. 806 (1974), an exemption to the federal Humane Slaughter Act for kosher meat was challenged under the *Lemon* criteria. A three-judge court rejected the challenge in a detailed opinion,

and this Court summarily affirmed. But the litigation threatened a central component of the Jewish dietary laws and created grave anxiety — for at least the duration of the lawsuit — within the Orthodox Jewish community.

Statutory and regulatory protection provided to consumers of kosher food in many jurisdictions has also been challenged by individuals who are intolerant or by those who have a commercial motive to deceive food purchasers because kosher products are usually more expensive than non-kosher foods. Appendix I to this brief reports on such a lawsuit lately brought in United States District Court for the District of Maryland. And a constitutional challenge to New Jersey's regulatory protection for kosher consumers was recently rejected by an intermediate appellate court in that State. *Ran-Dav's County Kosher, Inc. v. State*, 243 N.J. Super. 232, 579 A.2d 316 (App. Div. 1990). The case is now pending before the New Jersey Supreme Court.

Opponents of religious observance have not hesitated to invoke the *Lemon* standards to attack governmental accommodations to Jewish religious observance even though the accommodations have absolutely no impact whatever on the remainder of society. For example, by Jewish religious law, carrying on the public streets on the Sabbath is permitted only in an area which is surrounded by a symbolic border known as an "eruv." Telephone wires and overhead electrical cables may be used for this purpose, and in many communities throughout the United States Orthodox Jews have utilized such existing lines to simplify their religious observance of the Sabbath. Although there is no expense whatever to the community where the *eruv* is established and it is not even perceptible to those who do not use it, zealous advocates of the Establishment Clause invoked the *Lemon* "purpose" and "effect"

standards to challenge this innocuous accommodation to Orthodox Jews in federal and state courts. *See American Civil Liberties Union v. City of Long Branch*, 670 F.Supp. 1293 (D.N.J. 1987); *Smith v. Community Board No. 14*, 128 Misc.2d 944, 491 N.Y.S.2d 584 (Sup. Ct. Queens County 1985), *aff'd*, 133 A.D.2d 79, 518 N.Y.S.2d 356 (2d Dept. 1987), *appeal dismissed*, 71 N.Y.2d 891, 527 N.W.S.2d 773, 522 N.E.2d 1071 (1988). The challenges were unsuccessful, but they were taken seriously by the courts, caused anxiety within the Orthodox Jewish community, and strained the community's resources. If not for the overbroad language of the *Lemon* test, these suits would not have been brought.

Nor are we sanguine over judges' ability to distinguish, under *Lemon's* articulated standards, between sensible accommodations for religious observance and impermissible endorsements or establishments of religion. In the New Jersey kosher regulation case, a dissenting judge was ready to strike down important consumer-protection law because he concluded that the regulations "violate all three prongs of the test synthesized in *Lemon v. Kurtzman*." 243 N.Y. Super. at 359, 579 A.2d at 330. And it appears from the concurring opinion of Judge Bownes in this case that he would give broad literal application to the "secular purpose" component of the *Lemon* standard. His interpretation of "principal effect" leaves little room for governmental accommodation of a minority's religious observance.

Indeed, this Court's own efforts to apply the *Lemon v. Kurtzman* standards encourage confusion over the meaning of the *Lemon* standards. In *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court invoked the "primary effect" prong in striking down a state statute that protected religious observance against discrimination in private employment. The fact that the protection in *Thornton* was "absolute and unqualified"

— which was the central basis for the court's decision — was logically irrelevant to its "primary effect." *See* McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 56 (1986). But by announcing that the Connecticut statute was constitutionally flawed because of its "primary effect," the Court encouraged litigants and judges in lower courts to question all governmental flexibility towards religious minorities.

Shortly thereafter this Court professed to apply the *Lemon* "primary effect" standard in upholding a legislative exemption in *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327, 336-38 (1987), which involved a statutory provision that gave "special considerations to religious groups." 483 U.S. at 338. The message communicated to potential litigants and lower-court judges by these two rulings is that efforts at religious accommodation which judges dislike may be stricken for their "primary effect" while accommodations with which they are sympathetic may be upheld.

The current spate of litigation over benedictions and invocations during public school graduations is, in our view, the natural consequence of this Court's improvident loyalty to the imprecise terms of the *Lemon* test. The same zealotry that drags reasonable governmental accommodations for minority faiths to court is now prompting lawsuits against the practices of the majority. And the same reasoning that led to invalidation of an exemption to a Sunday law because it had the "primary effect" of aiding the religion of Sabbath-observers leads otherwise reasonable federal judges to prohibit reference to a deity in a public ceremony because its "primary effect" is to favor deistic faiths.

The time has come for this Court to jettison the *Lemon* standard and replace it with a constitutional rule that is closer to the original intent of the Establishment Clause. COLPA filed an *amicus* brief when *Lemon v. Kurtzman* was argued, and

we then expressed our concern "that those who are actively erecting the Wall Between Church and State seem to be burying under and in it the religious minorities it was designed to protect." Brief for the National Jewish Commision on Law and Public Affairs as *Amicus Curiae*, Oct. Term 1970, Nos. 89 & 153, p. 7. We argued that non-preferential and noncoercive accommodation to the religious convictions of all citizens does not violate the Establishment Clause.

At this juncture — when the minority religious communities of this country are reeling from this Court's wholly unexpected recent holding in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), which effectively removes most of the protection heretofore afforded by the Free Exercise Clause of the First Amendment — it is essential that the Establishment Clause not be construed in a manner that would undermine legislative or administrative accommodations to religion. Moreover, the extremes to which the *Lemon* standards have carried this Court, particularly in the area of non-discriminatory governmental assistance to the secular programs of religious institutions, threaten the viability of religious schools and the health of religious communities. We urge the Court to reverse this trend by articulating a new constitutional test for the Establishment Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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May 1991

APPENDIX I

BALTIMORE SUN 1/17/91

Vendor claims in suit that kosher meat law is unconstitutional

by Sheridan Lyons

A Towson man made a federal case yesterday of his conviction for selling non-kosher meats, claiming that the law he was convicted of breaking and the very existence of Baltimore's Bureau of Kosher Meat and Food Control violate the First Amendment's ban against government establishment of a religion.

George Barghout, owner of Yogurt Plus in Reisterstown Plaza, asked the U.S. District Court to declare the law unconstitutional — and to overturn his conviction in the District Court of Maryland for Baltimore and $500 fine.

Mr. Barghout's conviction last November followed a dispute that began in September 1989 when an inspector from the bureau complained that hot dogs Mr. Barghout was selling as kosher were put on the same rotisserie as other hot dogs — in violation of the Jewish dietary laws.

The inspector, Rabbi Mayer Kurcfeld, informed Mr. Barghout that Yogurt Plus was in violation of the kosher meat ordinance and had to stop advertising kosher hot dogs.

Mr. Barghout refused to sign the inspector's report, or file news that followed.

"The enforcement of a religious dietary law by criminal statute amounts to an active promotion and recognition of the Hebrew religion," according to the lawsuit, which also argued that a statute created "with the sole function of enforcing orthodox Hebrew religious rules ... fosters excessive entanglement between government and religion."

> *"The consumer should get what they're paying for."*
>
> **RABBI MAYER KURCFELD**
> *Inspector*

The civil complaint said the law is unconstitutionally vague, and named as defendants Baltimore Mayor Kurt L. Schmoke, the Baltimore City Council, the Bureau of Kosher Meat and Food Control, its chairman, Joseph Nelkin, and Rabbi Kurcfeld, the bureau inspector who brought the charges against Mr. Barghout.

Asked to comment on the suit last night, Rabbi Kurcfeld said the issue is economic: a vendor falsely advertising a product as kosher to anyone willing to pay a higher price.

Rabbi Kurcfeld said he had filed another violation against Mr. Barghout since the November conviction.

"The bottom line is money. If his advertising says kosher ... because there is a consumer out there who wants kosher," Rabbi Kurcfeld said. "The consumer should get what they're paying for."

Mr. Nelkin, bureau chairman and a lawyer, said that the issue is one of consumer protection rather than religion and noted that similar challenges have failed in federal courts in New York and New Jersey.

Mr. Barghout said after his conviction that the cooking of the kosher hot dogs with other hot dogs did not affect their kosher quality because "The flame doesn't contaminate the meat; it purifies it."

The Washington Post

Nov. 24, 1990

Dispute Revolves Around Rotisserie

Baltimore Restaurateur Vows to Fight Fine for Kosher Violation

By Paul W. Valentino
Washington Post Staff Writer

BALTIMORE, Nov. 23—The case started with the lowly hot dog. But if George Barghout has his way, it could be settled by a very high authority, the Supreme Court.

The issue, as he sees it, is separation of church and state. As city officials see it, the issue is false advertising stemming from non-separation of hot dogs.

Barghout, who sells hot dogs at his Yogurt Plus restaurant, was fined $400 in a city court last week after a food inspector said he defrauded the public by selling some hot dogs as "kosher" even though they had shared a rotisserie with non-kosher hot dogs.

Under traditional Jewish dietary law, as adopted by the Baltimore city code, kosher foods cooked with non-kosher foods become "contaminated" and thus lose their kosherness.

This, in turn, means any advertisement for commingled food as "kosher" is fraudulent.

That is where Barghout ran afoul of the law.

But to him, the issue is not whether he cooked Mogen David kosher hot dogs side-by-side with his deluxe non-kosher beef franks and then advertised them separately. The issue, he says, is whether a food inspector representing the city government should be allowed to enforce the laws of a religion.

"It is a violation of church and state separation" under the Constitution, Barghout said today. "I will appeal my guilty verdict," to the Supreme Court, if necessary, he said.

> *"Of the 200 violations I've cited in the last four years, he's the only one" to contest it.*
>
> — Rabbi Mayer Kurcfeld

But wait. There's more. Barghout, 54, a Palestinian who came to the United States 31 years ago, said his prosecution by specially trained rabbinical food inspectors is an effort by "Zionists to drive me out of business."

Not so, responds Rabbi Mayer Kurcfeld, a member of the Baltimore city-county Bureau of Kosher Meat and Food Control, which enforces the food preparation laws observed by many of the 92,000 Jews in the Baltimore area.

He said Barghout was prosecuted "as a last resort" after more than a year of negotiating. He said Barghout repeatedly refused to take remedial action suggested by officials, such as cooking his kosher and non-kosher hot dogs in separate rotisseries or removing the word "kosher" from billboards at his restaurant.

"Of the 200 [kosher] violations I've cited in the last four years," Kurcfeld said, "he's the only one who contested it. That's why we prosecuted him."

He said most kosher food handlers correct violations "on the spot."

Calling an alleged Zionist conspiracy "a lot of baloney," Kurcfeld said he is even-handed in his justice. Last year, he prosecuted Caplan Bros., a Jewish-owned meat market, for falsely representing chickens as kosher. The owners were fined $500 each and ordered to serve 18 months' probation and perform 100 hours of community service.

Kurcfeld said state enforcement

See HOT DOGS, D5, Col. 6

Baltimore Man Cited Under Kosher Code

HOT DOGS, From D1

of Jewish food preparation laws has been challenged in the courts of other states "but has not yet been overturned." The purpose of the laws, he said, "is to protect consumers who want to buy a kosher item" and prevent fraud through misrepresentation.

Kurcfeld said many non-Jews, including Moslems, buy kosher food, not for religious reasons, but for cleanliness and taste, even though it often costs more.

Barghout said he should not have to buy a second rotisserie, costing $700, just to satisfy kosher rules. He argued that by cooking kosher and non-kosher hot dogs on opposite sides of his rotisserie, they are satisfactorily separated.

But Kurcfeld said grease from the two kinds of franks "drips one onto the other" as they turn.

A spokeswoman for the D.C. food inspection branch said there are no rabbis or other special inspectors on the city payroll checking for compliance with kosher laws.